IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PEITION NO.2512 OF 2003

Infomedia India Ltd. ...Petitioner.

Versus

Suhas Shripad Gadre & Anr. ...Respondents.

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Mr. K.M. Naik with Mr.S. P. Dhulapkar for the Petitioner.
Mr. S. N. Deshpande for Respondent No.1.

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CORAM : DR. D.Y. CHANDRACHUD, J.

August 3, 2006.

ORAL JUDGMENT :

The First Respondent was engaged as a machine operator by the Petitioner at its establishment at Prabhadevi, Mumbai. The Petitioner was, at the material time, engaged in the business of printing. On 22nd June 1992, the First Respondent applied for leave from 1st July 1992 to 29th August 1992 on the ground that he was going on a tour to the southern part of India. The application for leave was sanctioned by the management and the First Respondent accordingly proceeded on leave. Upon the expiry of leave, the First Respondent did not report for duty. The evidence that has emerged

from the record shows that it is now an undisputed position that the First Respondent never proceeded on any tour within the territory of India but instead, took up employment in South Africa with a Company by the name of Golden Era which carried on the business of printing. The First Respondent was drawing wages at the material time, in the amount of Rs.4,000/- per month with the Petitioner. In the course of his deposition, the First Respondent stated that the ticket for his travel to and accommodation in South Africa was arranged by the South African employer. The salary which the First Respondent received in South Africa during the tenure of his employment was Rs.15,000/- per month, at the material time, in September 1992.

2. On 15th September 1992, the Petitioner addressed a communication to the First Respondent and intimated to him that in terms of Clause 13.4 of the Certified Standing Orders, the First Respondent had lost his lien on the job and that his name had been removed from the muster roll with effect from that date. The case of the First Respondent is that he learnt of the communication dated 15th September 1992 while he was in South Africa and that he eventually

returned to India in the month of December 1992; the cause for return being that he was unable to tolerate the atmosphere and the food in a foreign country.

3. The First Respondent moved the Conciliation Officer on 18th March 1993. On the conciliation proceedings having ended in failure, a reference was made for adjudication before the Industrial Court under Section 10 of the Industrial Disputes Act, 1947. The case of the First Respondent was that he proceeded to South Africa at the behest of the General Manager of the Petitioner, a person by the name of Mr. V.V. Kanuga. According to the First Respondent, the General Manager informed him that the Company was facing a recession and that if he found a job elsewhere, the Company would extend all possible co-operation. The Petitioner filed a Written Statement in which the case of the First Respondent was denied. Evidence was adduced in support of the Statement of claim by the First Respondent and, in defence, on behalf of the Petitioner. The Labour Court by its award dated 21st April 2003 held that the termination of the services of the First Respondent amounted to

retrenchment under Section 2(oo) of the Industrial Disputes Act, 1947 and since the retrenchment had been effected without complying with the provisions of Section 25F, the termination from service was illegal. The Petitioner was directed to reinstate the workman with continuity of service with effect from 15th September 1992 with back wages quantified at 50%.

4. On 19th November 2003, a Learned Single Judge of this Court granted rule on the petition. In so far as interim relief was concerned, the Learned Single Judge held that prima facie the conduct of the worker in leaving the country and joining service with an employer in a foreign country would not justify payment of back wages. The order on the payment of back wages was stayed, but stay on reinstatement was refused. An appeal against the interim order passed by the Learned Single Judge was dismissed by a Division Bench of this Court. The First Respondent has accordingly been allowed to join duty in pursuance of the interim directions of this Court. An affidavit has been filed on behalf of the Petitioner in these proceedings in which it has been stated before the Court that the

establishment at Prabhadevi wherein the First Respondent was employed has been entirely closed; that all the machinery, plant and equipment have been sold together with the landed property and that all the other workmen who were engaged in the establishment at the time of closure had applied for and were granted voluntary retirement under a scheme floated by the management. Since this has been disputed on behalf of the workman that is an issue which would warrant consideration in a subsequent part of this judgment.

5. On behalf of the Petitioner it has been submitted that: (i) Clause 13.4 of the Certified Standing Orders specifically contemplates that a workman who has remained absent beyond the period of leave shall be liable to lose his lien on his appointment unless he returns within eight days of the expiry of the sanctioned leave and explains his absence to the satisfaction of the management. Thereafter, if the workman does not return for duty within a period of fifteen days of the expiry of his leave, he shall be treated as having left service from the date he was due to return to work; (ii) Provisions of Standing Orders similar to that which falls for

consideration in the present case, have been construed by the Supreme Court in **Buckingham and Carnatic Co. vs. Venkatayya,**[1] and in **National Engineering Industries vs. Hanuman.**[2] Conduct of a workman which falls within the purview of the Standing Order gives rise to an inference of abandonment or relinquishment of employment, upon which his services would stand automatically terminated without any further action on the part of the employer; (iii) In the circumstances, this does not amount to retrenchment within the definition of that expression in Section 2(oo) of the Industrial Disputes Act, 1947; (iv) While the judgment of the Supreme Court in **D.K. Yadav vs. J. M. A. Industries Ltd**.,[3] requires that the principles of natural justice must be read into a Standing Order which postulates a loss of lien on the failure of an employee to report to work upon the expiry of a stipulated period. Once a challenge is raised in a reference under Section 10 of the Industrial Disputes Act, 1947 and evidence is adduced before the Tribunal, it is for the Court to evaluate as to whether the employee has a reasonable or plausible explanation for his absence from work; (v) Once it is

1 1963 II LLJ 638
2 1967 II LLJ 883
3 1993 II CLR 116

demonstrated that there was absolutely no plausible reason to be absent from work and the facts demonstrate an intention to abandon or relinquish duties, a mere breach of the principles of natural justice cannot lead to an invalidation of the severance of the relationship of employer and employee which has taken place upon the conduct of the employee in abandoning his duties; (vi) On the facts of this case, evidence on the record shows that the workman took up a job in South Africa, by offering a false justification for the leave which he took to travel within India and the award of the Labour Court requires interference under Article 226 of the Constitution; (vii) The establishment at Prabhadevi where the workman was engaged has been completely closed and the landed property as well as machinery have been sold. All workmen at the establishment on the date of the closure had applied for and were granted voluntary retirement. The management should not be saddled with the requirement of reinstating the workman. The effect of the interim direction has been that the Petitioner was compelled to allow the First Respondent to report for work despite the absence of work.

6. On the other hand, Counsel appearing on behalf of the First Respondent has sought to sustain the correctness of the order passed by the Labour Court by asserting that (i) In the present case, the management had struck off the name of the workman from the muster roll which involved a positive act of termination thereby attracting the provisions of Section 2(oo) of the Industrial Disputes Act, 1947; (ii) The allegations against the workman would show that the case of the management was that the workman was guilty of misconduct in which case the management ought to have issued a chargesheet followed by a regular disciplinary enquiry before proceeding to terminate the services of the workman; (iii) No opportunity was given to the workman of explaining his absence from duty and the order of termination was contrary to the principles of natural justice; (iv) An adverse inference ought to have been drawn against the management for its failure to produce the then General Manager Mr. V.V. Kanuga who had called upon the workman to take alternate employment which was not rebutted by the management; the non-production of Kanuga for the purposes of giving evidence is a vital omission to substantiate the defence; and (v) The statement of

the management that the establishment at Prabhadevi has been closed is erroneous.

7. In considering the submissions which have been urged on behalf of the contesting parties, it would, at the outset, be necessary to advert to the provisions of the Certified Standing Orders. Standing Order 13.4 provides as follows :

> "(4) A workman remaining absent beyond the period of leave originally granted or subsequently extended, shall be liable to lose his lien on his appointment unless he returns within eight days of the expiry of the sanctioned leave and explains to the satisfaction of the authority granting leave his inability to resume his duty immediately on the expiry of his leave. A workman who loses his lien under the provisions of this Standing Order but reports for duty within fifteen days of the expiry of his leave shall be kept on the waiting list if he so desires and his name shall thereupon be entered in the waiting list. A workman not reporting for duty within fifteen days of the expiry of his leave shall be treated as having left the service from the date he was due to return to work."

Now what this Standing Order provides is that a workman who remains absent beyond the period of sanctioned leave is liable to lose his lien unless he returns within a period of eight days of the expiry of the leave and explains the reasons for his absence beyond the period of leave that was sanctioned, to the satisfaction of the management.

A workman who has thus lost his lien but who returns for duty within fifteen days of the expiry of the leave is to be kept on the waiting list. However, in the event that the workman does not report for duty within a period of fifteen days of the expiry of leave, he has to be treated as having left the service from the date on which he was due to return to work.

8. The Supreme Court considered the impact of a Standing Order which contains a deeming provision by which a workman is treated as having left the service of the management upon absenting from work for a certain stipulated period without leave. In **Buckingham and Carnatic Co. vs. Venkatayya,** (supra), the Standing Order was to the following effect :

> "Absent without leave.- Any employee who absents himself for eight consecutive working days without leave shall be deemed to have left the company's service without notice thereby terminating his contract of service. If he gives an explanation to the satisfaction of the management, the absence shall be converted into leave without pay or dearness allowance.
>
> Any employee leaving the company's service in this manner shall have no claim for re-employment in the mills.

> But if the absence is proved to the satisfaction of the management to be one due to sickness, then such absence shall be converted into medical leave for such period as the employee is eligible with the permissible allowances".

Mr.Justice P.B. Gajendragadkar (as the Learned Chief Justice then was) delivered the judgment of a Bench of three Learned Judges of the Supreme Court and noted that under the common law an inference that an employee has abandoned or relinquished service is not easily drawn unless an inference to that effect can be legitimately drawn from the length of absence and other surrounding circumstances. Abandonment, the Court noted, was a question of intent and normally such an intention cannot be attributed to an employee without adequate evidence in that behalf. The Court, however, held that the position is different where a specific provision is made in the conditions of service as contained in a certified Standing Order. In that case, it is a matter of construing the relevant term itself. The Court held thus ;

> "But where parties agree upon the terms and conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the

> relevant term itself. Therefore, the first part of Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment."

The Supreme Court held that the latter part of the Standing Order under which the employee was entitled to offer an explanation for his absence was in substance a proviso to the first part. If the explanation is treated as satisfactory by the management, the inference of a termination of the contract of service would stand rebutted. Contrariwise, if the explanation is not found to be satisfactory by the management, the inference arising in the first part would prevail and the employee should be deemed to have terminated his contract of service with the result that the relationship of employer and employee would cease. The Supreme Court held that though the Standing Orders may also provide for the institution of disciplinary proceedings on a charge of misconduct and an absence from duty is also a misconduct, the termination of the contract of service under the Standing Orders for the absence of the employee, without leave, for a stipulated period was entirely different

from the employer adopting disciplinary proceedings to penalise the employee for his misconduct. If the Certified Standing Order was applicable, it was no answer to the employer's case to say that a case of misconduct is also attracted. Finally, the Supreme Court also held that such a cessation of the relationship of employer and employee follows automatically without a positive act on the part of the employer:

> "Where termination of the employee's services follows automatically either from a contract or from a Standing Order by virtue of the employee's absence without leave for the specified period, such termination is not the result of any positive act or order on the part of the employer, and so, to such a termination the prohibition contained in S.73 (1) would be inapplicable."

To such a termination, it was held that Section 73 of the Employees' State Insurance Act was not attracted.

9. The judgment in **Buckingham and Carnatic** came to be followed by a Bench of two Learned Judges of the Supreme Court in **National Engineering Industries vs. Hanuman,** (supra). The Certified Standing Orders in that case provided that a workman who

did not report for duty within eight days of the expiry of his leave lost his lien on the appointment. The Supreme Court held that the consequence of the Standing Order was that the services of the workman would stand automatically terminated on the happening of the contingency envisaged in the Standing Order :

> "This shows what the workman understood the Standing Order in question to mean. The Standing Order is inartistically worded, but it seems to us clear that when the Standing Order provides that a workman will lose his lien on his appointment in case he does not join his duty within eight days of the expiry of his leave, it obviously means that his services are automatically terminated on the happening of the contingency. We do not understand how a workman who has lost his lien on his appointment can continue in service thereafter. Where therefore, a Standing Order provides that a workman would lose his lien on his appointment, if he does not join his duty within certain time after his leave expires, it can only mean that his service stands automatically terminated when the contingency happens."

10. Before completing the narration of this line of cases, it would be necessary to advert to certain other judgments of the Supreme Court. In **Management of M/s.Indian Iron & Steel Co. Ltd. vs. Prahlad Singh,**[4] the Certified Standing Orders postulated a loss of lien on the part of the workman in the event of a workman

4 2001 I CLR 185

remaining absent beyond the period of leave unless he returned within ten days of the expiry of leave and explained the reasons for his absence to the satisfaction of the management. The workman was on leave from 1st July 1974 to 20th September 1974 and upon his failure to return, a notice was issued by the management on 8th October 1974 terminating his services with effect from 21st September 1974. The workman challenged the termination nearly thirteen years thereafter in April 1987 by raising a dispute. The Industrial Tribunal rejected the reference firstly, on the ground of delay on the part of the workman in raising the dispute and secondly, on the ground that the loss of lien upon the failure of the employee to return on the expiry of leave was automatic. This automatic termination was in accordance with the Standing Order which would be binding both on the management and the workman. The judgment of the Tribunal was set aside by a Learned Single Judge of the Patna High Court and that decision was confirmed in appeal by a Division Bench. In a Special Leave Petition filed by the management, the Supreme Court held that the High Court was in error in reversing the decision of the Tribunal. The Supreme Court held that the Tribunal

was correct in finding fault with the workman for raising a dispute only after an expiry of a long period of thirteen years. The Supreme Court also held that the Tribunal had not refused relief merely on the ground of delay and latches but had held that even without considering the question of delay, the workman had lost his lien on his appointment. A similar view was taken by the Supreme Court in **Dr.Anil Bajaj vs. Post Graduate Institute**,[5] which was a decision of three Learned Judges. The Petitioner in that case who was a doctor was permitted to take an assignment abroad, *ex-post facto*, for a period of two years from 27th September 1994. The letter of sanction stipulated that in the event that he failed to resume duty upon the expiry of the period of sanction, his lien would automatically expire and he would be deemed to have permanently left the institute from the original date. The Petitioner did not return to duty until 1998 and his request for extension, in the meantime, was rejected. The Supreme Court held that a person who had obtained an advantage, namely of a sanction to go abroad on service on the condition that he would come back within two years, failing which his lien would be automatically terminated was estopped from turning back and challenging the basis

5 2002 I CLR 923

on which he was granted sanction to go abroad.

11. Section 2(oo) of the Industrial Disputes Act, 1947 which was inserted by Act 43 of 1953 defines the expression 'retrenchment' to mean the termination by the employer of the service of a workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action. An exception is, however, carved out by the second part of Section 2(oo) in four stipulated categories which are not included in the definition of the expression. These four categories are: (i) Voluntary retirement of a workman; (ii) Retirement of the workman on reaching the age of superannuation as contained in the contract of employment; (iii) Termination of the service of the workman as a result of the non-renewal of the contract of employment on its expiry or upon such contract being terminated in accordance with a stipulation contained therein; and (iv) A termination on the ground of continued ill-health. The width of this definition was noted by a Constitution Bench of the Supreme Court in **The Punjab Land Development & Reclamation Corporation Ltd. vs. The Presiding Officer, Labour Court.**[6] The Supreme Court held that the definition

6 1990 II CLR 1

of “retrenchment” would show that firstly it means termination by the employer of the service of a workman for any reason whatsoever. The Supreme Court held that having said so, Parliament had proceeded to limit the definition by excluding certain types of terminations. Had Parliament envisaged only the question of termination of surplus labour, there would arise no question of excluding categories which stand basically excluded. The Supreme Court held that while naturally and ordinarily the expression “retrenchment” meant discharge of surplus labour, the defined meaning was termination of service of a workman for any reason whatsoever except for those reasons excluded in the definition itself. Analysing the definition, the Supreme Court held that termination by the employer of the services of a workman would not have otherwise covered the cases excluded in clauses (a) and (b) viz., (i) voluntary retirement; and (ii) retirement on attaining the age of superannuation since there would be no volitional element of the employer. Their express exclusion implies that those categories would otherwise have been included. Again, the Supreme Court noted, if those cases were to be included, termination on abandonment of service, or on efflux of

time, and on failure to qualify, although only consequential or resultant, would be included as those have not been excluded. Thus, the Supreme Court held, there appears to be a gap between the first part and the exclusionary part. It would be necessary for the purpose of present case to note that it was specifically urged before the Supreme Court that if retrenchment is understood in its wider sense that would affect the rights of the employer under the Standing Orders and under contracts of employment. That was, however, repelled by the Supreme Court with the following observations:

> "The last submission is that if retrenchment is understood in its wider sense what would happen to the rights of the employer under the Standing Orders and under the contracts of employment in respect of the workman whose service has been terminated. Firstly, those rights may have been affected by introduction of Ss.2(oo), 25-F and the other relevant sections. Secondly, it may be said, the rights as such are not affected or taken away, but only an additional social obligation has been imposed on the employer so as to give the retirement benefit to the affected workmen, perhaps for immediate tiding over of the financial difficulty. Looked at from this angle, there is implicit a social policy. As the maxim goes – *stat pro ratione voluntas populi;* the will of the people stands in place of a reason."

In the circumstances, the principle that has been laid down by the Constitution Bench of the Supreme Court while interpreting Section 2

(oo) is that retrenchment means the termination by the employer of the service of a workman of any reason whatsoever except what is expressly excluded by the definition.

12. The impact of the judgment of the Constitution Bench in **Punjab Land Development** (supra) on Certified Standing Orders providing for loss of lien upon the absence of an employee for a stipulated period came up specifically for consideration before three Learned Judges of the Supreme Court in **D.K. Yadav vs. J. M. A. Industries Ltd**.,(supra). The Certified Standing Order in that case – 13(2)(iv) - provided for a loss of lien in the case of a workman who remained absent without sanctioned leave unless he returned within eight days of the expiry of the leave and explained to the satisfaction of the management the reasons for his absence. In such a case, the services of the workman would be deemed to have been terminated automatically. The Supreme Court adverted to the judgment of the Constitution Bench in **Punjab Land Development** and found merit in the submission urged on behalf of the workmen that the expression "retrenchment" as defined in Section 2(oo) was comprehensive,

intended to cover any action of the management to put an end to the employment of any employee for any reason whatsoever. The Supreme Court, however, held that it was not resting its conclusion on this aspect alone since it was of the view that the termination was in breach of the principles of natural justice. The judgment of the Supreme Court also held that the right of the employer under clause 13(2)(iv) of the Standing Orders was affected by the operation of Section 2(oo). The Constitution Bench in **Punjab Land Development**, the Court held, had in fact, considered the same question vis-a-vis a right of the employer to assert his right under the Certified Standing Orders. The decision in **D. K. Yadav** rejected the argument that there was an automatic termination and held that such a contention was inconsistent with the law as laid down in the judgment of the Constitution Bench:

> "His contention that expiry of eight days' absence from duty brings about automatic loss of lien on the post and nothing more need be done by the management to pass an order terminating the service and per force termination is automatic, bears no substance. The Constitution Bench specifically held that the right of the employer given under the Standing Orders gets affected by statutory operation. In **Robert D'Souza'** case (supra) in para 7, this Court rejected the contention that on expiry of leave the termination of service is automatic and nothing further could be done. It

> was further held that striking of the name from the rolls for unauthorised absence from duty amounted to termination of service and absence from duty for 8 consecutive days amounts to misconduct and termination of service on such grounds without complying with minimum principles of natural justice would not be justified. In **Shambhunath's** case three Judge bench held that striking of the name of the workman for absence of leave itself amount to retrenchment. In **H.D. Singh v. Reserve Bank of India & Ors.** (supra), this Court held that striking of the name from the rolls amounts to an arbitrary action."

The Supreme Court held that the Certified Standing Orders had statutory force and before the employer took any action to put an end to the tenure of a workman, fair play required that a reasonable opportunity to put forth his case should be furnished to the workman. The principles of natural justice, it was held must, therefore, be read into the Certified Standing Orders. The facts of **D.K. Yadav**'s case are significant for the present controversy particularly as they would have a bearing on the nature of the relief that the Court must mould. In **Yadav's** case, it was found that though the employee reported back for duty on 3rd December 1980, and on all subsequent days and expressed his readiness to join duty, he had been prevented by the management from reporting for work. The contention of the workman

was that he had been wrongfully excluded from performing his duties. The management's conduct was unlawful.

13. The law laid down in **D.K. Yadav's** case has since been followed in a line of authorities by the Supreme Court. In **Syndicate Bank v. General Secretary, Syndicate Bank Staff Association.**[7] Clause 16 of the bipartite settlement between the Bank and its employees contained a deeming provision of voluntary retirement upon the absence of an employee beyond the stipulated period. Clause 16, however, required the employer, the Bank, to furnish a notice to the employee calling upon him to report for duty. The Supreme Court adverted to the judgment in **D.K. Yadav's** case and held that the principles which emerged from the decided cases were that (i) Principles of natural justice and the duty to act in a just, fair and reasonable manner have to be read into the Certified Standing Orders which have statutory force; (ii) Where a domestic inquiry was not held or it was vitiated for some reason the Tribunal adjudicating an industrial dispute can itself go into the question raised before it on the basis of the evidence and other material on record. On the facts,

7 2000 II CLR 472

the Supreme Court held that the essential requirements of informing the workman of the complaint, of furnishing an opportunity to state his case and of good faith action on the part of the management were all fulfilled. The evidence showed that the Bank had addressed a registered cover to the employee which had been returned with the endorsement that it was refused. The Supreme Court held that a clear presumption arose in favour of the Bank. The Supreme Court held that an enquiry would have been necessary if the workman had submitted an explanation which was not acceptable or it was contended that the workman had reported for duty but was prevented from doing so. Even assuming that an enquiry was necessitated, the evidence led before the Tribunal showed that a notice was given to the workman and it was he who had defaulted by not furnishing an explanation for his absence from duty. Similarly in **Punjab & Sind Bank v. Sakattar Singh,**[8] the Supreme Court held that if despite having been given an opportunity of a hearing, the workman had not been forthcoming with an explanation regarding his unauthorised absence or if he failed to report for work in spite of an opportunity, there would be sufficient compliance of the principles of natural

8 (2001) 1 SCC 214

justice. In a subsequent decision in **Vivekanand Sethi v. Chairman, J & K. Bank Ltd.**,[9] the Supreme Court held that while the principles of natural justice were required to be complied with, a full-fledged departmental enquiry was not necessary. The Court held that a limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duty after the period of leave had expired or a failure on his part on being asked so to do, would amount to sufficient compliance with the requirements of the principles of natural justice.

14. These principles have been reiterated in a recent judgment of the Supreme Court in **Banaras Hindu University vs. Shrikant,** decided on 12th May 2006.[10] In that case the Respondent was a lecturer in Opthalmology. His wife who was also employed in the University, had secured a Fellowship abroad for which she made an application for sanction of substantial leave. The Respondent who desired to assist his wife and attend a conference, applied for leave. The leave application was forwarded by the Head of the Department.

9 (2005) 5 SCC 337
10 (Manupatra SC-2006-386)

The Respondent had, in fact, handed over charge to a designated Medical Doctor. The application filed by the Respondent's wife was sanctioned. The Respondent was called upon to join his duties by the Registrar of the University and to show cause as to why he should not be proceeded against for acts of misconduct. The University thereafter addressed a letter to the Respondent that if he did not respond to the notice, he would be deemed to have abandoned service. The Respondent returned back to India and submitted an application which was not accepted on the ground that he had abandoned service. The Supreme Court held that the facts in the case showed that the Respondent had made all attempts to join duty, but the situation prevented him from doing so beyond his control. The Vice Chancellor was held not to have any jurisdiction.

15. The submission that has been urged on behalf of the Petitioner is that the effect of Standing Order 13.4 is to bring into existence a deeming fiction that the workman has left service in the situation envisaged therein. Counsel emphasises that the Standing Order initially provides for the loss of lien on appointment unless the

workman returns within a period of eight days of the expiry of sanctioned leave with a satisfactory explanation. If the workman does not return even upon expiry of fifteen days, he will be treated as having left the service.

16. The Supreme Court construed a Standing Order providing for a loss of lien initially in **Buckingham and Carnatic** (supra). Standing Order 8(ii) which was under consideration before the Supreme Court, enabled the workman to have an opportunity to submit an explanation to the satisfaction of the management, in which case, the period of absence was liable to be converted into leave without pay. If the absence was proved to the satisfaction of the management to be due to sickness, the workman was entitled to medical leave. These provisions of the Standing Order, therefore, provided an opportunity for the workman even after the expiry of eight days of the sanctioned leave to produce his explanation before the management and justify the reason for his absence after the expiry of the leave. In the event that the explanation was satisfactory, the inference of termination of the contract of service was to stand

rebutted. Therefore, the judgment in **Buckingham** cannot be regarded as laying down the principle that a requirement consistent with the principles of natural justice is not implicit in such a Standing Order. The Standing Order there, it must be noted, did contemplate an opportunity to the workman to submit an explanation. In the course of the judgment, the Supreme Court made a reference to the Employees' State Insurance Act under which there was a prohibition on the employer discharging or dismissing an employee who was in receipt of sickness benefit. While considering the effect of Section 73, the Supreme Court held that what was prohibited was some positive action on the part of the employer such as by way of dismissal or discharge but Section 73(1) would not be attracted where the termination followed automatically either from a contract or a Standing Order. These observations were made in the context of the interpretation that was to be placed on Section 73(1) and not in the matter of construing the relevant provisions of Certified Standing Order 8(ii). In so far as the Standing Order was concerned, the Supreme Court held that in the event that the workman furnished a satisfactory explanation, the inference of a termination of contract

would stand rebutted. The subsequent judgment in **National Engineering Industries** (supra) on which reliance has been placed also involved a situation where the standing order provided for a loss of lien upon the failure of the employee to report for duty within eight days. The Labour Court held that as a matter of fact the workman had remained ill during a period of nine days in April 1965, on the basis of a medical certificate. The Supreme Court held that this finding was *ex-facie* shown to be perverse since both witnesses who were produced by the workman had not corroborated his statement. The fitness certificate was never produced before the Labour Court and the record of the dispensary was not similarly produced. The second issue which arose before the Supreme Court was that the workman had made an application under Section 33A of the Industrial Disputes Act, 1947 for reinstatement as an industrial matter was pending at the time in which he was concerned as a workman. The management submitted in the appeal before the Supreme Court that since the services of the workman were automatically terminated under the relevant Standing Order, Section 33 was not contravened and no application would lie under Section 33A. The Supreme Court

held that Section 33A would not apply since the services stood automatically terminated upon the expiry of eight days of the period of leave on 9th April 1965.

17. The principle of law which has since been laid down by the Constitution Bench of the Supreme Court in **Punjab Land Development** (supra) is that the definition of the expression "retrenchment" in Section 2(oo) postulates termination by the employer of the services of a workman for any reason whatsoever save and except for what is expressly excluded in the Section. The Constitution Bench noted that the cases of (i) voluntary retirement; and (ii) retirement on reaching the age of superannuation which are excluded from the definition of retrenchment would not otherwise have been covered by the substantive part of the definition since there was no volitional element of the employer. However, their express exclusion implied that those cases would otherwise have been included. Moreover, if those cases were to be included, termination or abandonment of service although only consequential or resultant would be included as they have not been excluded. The

impact of giving a wide interpretation of the definition in Section 2 (oo) on the Standing Orders has been specifically considered by the Supreme Court. The Supreme Court has held that the right conferred upon the employer by the Standing Orders may have been affected by the introduction of Section 2(oo), Section 25F and other relevant sections of the Industrial Disputes Act, 1947. Moreover, the Supreme Court has observed that the rights of the employer as such are not affected or taken away, but an additional social obligation has been imposed on the employer so as to give a retrenchment benefit to the workmen. This, the Court has held, is a matter of social policy. The impact of the judgment in **Punjab Land Development** has been explained by the Supreme Court in **D.K. Yadav's** case. In **D.K. Yadav**, the Supreme Court once again rejected the submission that there was an automatic loss of lien upon the failure of the workman to report to work upon expiry of leave. Moreover, the Supreme Court has specifically held, referring to its earlier judgments, that striking out the name of a workman for absence without leave amounted to retrenchment.

18. In view of these binding principles of law which have been laid down by the Supreme Court, it would not possible to accept the submission urged on behalf of the Petitioner that there was an automatic loss of lien upon the failure of the employee to report for work within a period of eight days of the expiry of the leave and an automatic termination of service if the employee did not report within a period of 15 days. Before the employer seeks to take action for asserting that consequence, there has to be due compliance with the principles of natural justice. The requirement of natural justice must be read into the provisions of the Certified Standing Orders. The Certified Standing Orders have a statutory flavour under the Industrial Employment Standing Orders Act, 1946. It is settled law that where the civil rights of an individual are adversely affected, the requirement of fairness warrants that an opportunity consistent with the principles of natural justice should be given to him. Now, an opportunity in a manner which is consistent with the principles of natural justice does not necessarily warrant the holding of a full-fledged departmental enquiry. What is required is an opportunity with a view to enable an employee to furnish any explanation he may have for explaining his

absence without leave. An employee may have a justifiable reason for absence from duty beyond the period of leave. It is not necessary for this Court to catalogue exhaustively the circumstances in which that may be the case. It would, however, suffice to note that the law contemplates as an incident of the requirement of fair treatment that at least a notice should be given to an employee so that he would have an opportunity to explain why he was absent from work.

19. Now in so far as the facts of the present case are concerned, parties adduced evidence before the Labour Court in support of their respective cases. The First Respondent admittedly sought leave of absence from 1st July 1992 to 29th August 1992 and the reason that he furnished for proceeding on leave was that he was going on tour to the southern part of India. That this reason was *ex-facie* false, has emerged from the First Respondent's deposition in the course of cross-examination. The First Respondent has stated as follows:

> "It is true leave application it is mentioned reason for leave 'Going on tour S. India'. It is true during this period of 60

> days from 1-7-92 to 20-8-92 I never went to tour of South India. It is true during this period I went to South Africa."

Admittedly after 29th August 1992, the First Respondent did not make any application for extension of his leave. The admissions that were made by the First Respondent during the course of his cross-examination show that (i) During the period of leave that was sanctioned to him, the First Respondent had proceeded to South Africa where he worked in a company by the name of Golden Era which was engaged in the business of printing; (ii) The tickets for his travel were purchased by the South African employer and it was the foreign employer who had provided accommodation to him during his stay in South Africa; (iii) While the First Respondent was drawing a monthly wage of Rs.4,000/- with the Petitioner, be secured employment on a monthly salary of Rs.15,000/- with the South African employer; (iv) The First Respondent had a friend by the name of Vasant Kelkar who was also an employee with the South African Company; (v) The First Respondent would have continued to remain in South Africa itself, but for the circumstance, as he stated, that he was unable to adjust to the atmosphere in the foreign country. In so

far as the last of the aforesaid inferences is concerned, the First Respondent deposed thus in the course of his evidence:

> "It is true atmosphere in the South Africa including food I cannot tolerate. It is true if atmosphere including food it would have tolerated by me I would have continued there in South Africa itself."

20. The case of the First Respondent in the course of his Examination-in-Chief was that in the months of April and May 1992, the General Manager of the Company, Mr. Kanuga had told the workmen that the Company was facing a recession and that they should find a job "outside and that the Company would give all cooperation required." According to the First Respondent, the workmen were told that if they could not find jobs elsewhere, the Company would reluctantly terminate their services. According to the workman, in June 1992, he was called by Mr.Kanuga who informed him that there was a job for him in South Africa and that if he consented, everything would be arranged, save and except, for the fare and accommodation. The theory that the Company was facing a recession in 1992 was sought to be rebutted first in the course of the cross-examination of the workman himself. In the course of cross-

examination, the workman admitted that in 1992, work was going on in three shifts. The workman admitted that the machinery which had been installed by the Company was of German origin and that when the Company was to send employees for training, they were sent only to Germany. In that case the entire expenses were borne by the Company. The First Respondent admitted that no letter was given at any time informing him that he was selected for training in Germany. In so far as the visit to South Africa was concerned, as already noted earlier, the fare was borne by the foreign employer. The workman deposed that he was unable to state whether the Petitioner had any business relationship with his South African employer. The conduct of the workman in the present case, after the receipt of the letter dated 15th September 1996, is also of significance. The First Respondent stated that the letter was received by his brother in Mumbai and that in October 1992, he received intimation in South Africa. The workman admitted that despite receipt of intimation that his services had been terminated, he did not address any letter to the General Manager, Mr. Kanuga, complaining that it was Mr.Kanuga who had sent him to South Africa, and who had now proceeded to

terminate his services.

21. The omission on the part of the First Respondent to address even a single letter to the General Manager of the Company who according to the workman, had given him an assurance, is significant. In the ordinary and normal course of things, the First Respondent would have addressed a letter immediately upon receipt of the intimation of termination complaining that it was on the assurance of the General Manager that he had proceeded to South Africa. Nothing of the kind was done. Mr. Kanuga who had verified the Written Statement on behalf of the management before the Labour Court attained the age of superannuation in 1998. On behalf of the management, Shri K. Velayudhan stepped into the witness box. The witness was in the year 1992 working as a supervisor in the Offset Machine Department and said that the First Respondent was working under his direct supervision. The witness stated that in the history of the Company, at no point of time had the management sent any of the workmen to any foreign country except for the purpose of training. The witness stated that company had no business

relationship with Golden Era of South Africa and there was no occasion for the Company to arrange employment for the First Respondent in South Africa. The witness stated that no employee had, at any point of time, been given any promise by the General Manager. The witness stated that the workman in the present case was working as an operator on a 72-V Hydel Bag Machine in the Prabhadevi establishment; that even prior to 1992 and right until 1998-99 the aforesaid machine was operating in three shifts. It was only in the year 1999 that work in three shifts came to be discontinued when there was a slack in the overall business and upon the introduction of sophisticated machines, work could be carried out faster. The witness also stated that since 1992 there was a gradual reduction in the strength of workers. The second witness who deposed on behalf of the Petitioner was a Deputy General Manager in charge of Personnel and Administration. He stated that from the record it was borne out that the First Respondent was never recommended or selected for training; the Company has no connection with the South African employer of the First Respondent; the records of the Company showed that even after the First

Respondent left for South Africa, the machine on which he was working was engaged in three shifts; and the machine was in operation until 31st March 2001. The evidence on the record demonstrates that the First Respondent failed to establish the case that the Company was suffering a recession in 1992 and that it was on the advice of the General Manager that he had left India. An adverse inference has to be drawn against the workman upon the omission on his part to address even a single letter to the General Manager who had allegedly given him an assurance. That apart, sufficient material was produced on the record by the management to establish that since the Company deployed German machinery, it was only to Germany that the workmen were sent; that also, for the purposes of training. Even in such a case, the established practice was to short list workmen who were selected for training. The workmen were informed in writing and it was after a workman confirmed his readiness that the Company made arrangements for his travel. Nothing of the kind took place in the present case. The material placed on the record clearly shows that the workman made a false statement in his leave application to the effect that he was

proceeding on a tour of the southern part of India. Instead, he took up employment several thousand miles away, in distant South Africa. He misled the employer into believing that his absence was on vacation. The workman admitted in the course of his examination that he would have remained in South Africa but for the intervening circumstance that he did not find the conditions in that country to his liking. The admission of the workman in his evidence shows that his intention when he took leave was to take up employment abroad and not to return to the Indian employer. In these circumstances, and on the facts which have emerged on the evidence before the Labour Court, it would be impossible for this Court to hold that a case for reinstatement was made out.

22. The principles of natural justice, it is well settled, are in aid of justice. In a case such as the present, they are intended to protect an employee, should the employee have a plausible reason for his absence from duty. For instance, **D.K. Yadav**'s case involved a situation wherein the workman had in fact, reported for duty, but was prevented by the management from doing so. In the **Banaras Hindu**

University (supra) the spouse of the lecturer was sanctioned substantial leave to go abroad and he himself had a recommendation from the Head of Department to attend a conference abroad. Similarly in **Kashibai Sachidanand v. M/s. Hindustan Pencils Pvt. Ltd.**,[11] which came up for decision before a Division Bench of this Court, the workman in question was pregnant at the material time and during the course of child birth, her twins had died. The workman was continuously ill between August and November 1971 and her conduct showed that she had sent letters and medical certificates to the management. These circumstances militated against the acceptance of the contention of the employer that the workman had abandoned service. The principles of natural justice are not meaningless incantations but are intended to provide an opportunity of an explanation to be given by the workman. This is not a case where the workman can establish on the basis of the facts which have emerged in the course of evidence any prejudice as a result of the failure of the employer to comply with the principles of natural justice. The irresistible inference from the evidence that has been brought on the record is that the First Respondent left India in search of better

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prospects abroad and that when he left for South Africa, he had no intention of returning back to his employer. The Labour Court has lost sight of material evidence on the record.

23. Even otherwise, this is not a case for the grant of reinstatement. In **Surendra Kumar Verma vs. Central Government Industrial Tribunal, New Delhi**,[12] the Supreme Court held that though ordinarily the setting aside of an order terminating the services of the workman would lead to a consequential order of reinstatement, there may be exceptional circumstances which make it impossible or wholly inequitable to pass an order of reinstatement with back wages. These circumstances have been explained thus:

> "Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement will full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the Court to make appropriate consequential orders. The

12 1981 I LLJ 386

> Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the Court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages."

24. In the present case, an affidavit has been filed on behalf of the Petitioner on 23rd November 2004 in reply to a Notice of Motion taken out by the First Respondent recording that the Petitioner had sold all the machinery at the Prabhadevi Factory Establishment, the printing business having become unviable. It was stated in that affidavit that no printing business is carried out at the Prabhadevi establishment since 1st April 2001. As a result, it was stated that the First Respondent had been sitting idle without any work. In a further affidavit dated 3rd March 2005, filed on behalf of the Petitioner, it has been stated that the Company had introduced a voluntary retirement scheme for its employees at the Prabhadevi Establishment and out of 224 employees, 181 employees had opted for voluntary retirement. In a further affidavit dated 19th July 2006, it has been stated that the Petitioner declared a Voluntary Retirement Scheme in March 2000

which was valid until 31st March 2000 and a further scheme on 9th March 2001 which was valid until the end of March 2001. Almost all the employees in the category of workmen opted for voluntary retirement in 2001 as a result of which working at the Department came to a halt on 31st March 2001. With effect from 1st April 2001, all the manufacturing activities in the Prabhadevi Factory had come to be discontinued. The administrative office of the Petitioner at Prabhadevi was shifted to the Ruby Mills Compound with effect from 15th September 2005. The machinery was sold in October/November 2001 and the landed property of the Prabhadevi Factory was disposed of under an agreement dated 15th March 2005 between the Petitioner and Creole Holdings Co. Pvt. Ltd. As on 1st April 2001, after voluntary retirement was taken by the workmen, there is not a single workman in the Binding, Quality Inspection, Offset, Reading and Paste-up Departments. One Manager has been continued for non-plant maintenance.

25. An affidavit in rejoinder was filed on behalf of the First Respondent for the purposes of controverting the statements made

on behalf of the management. In the affidavit it has been submitted that the Company is carrying on certain activities at its establishment at Nerul. The First Respondent adverted to the names of nine employees who were operators and who according to him, are still working at the Ruby Mills Compound. He has also adverted to the case of the five other employees who were transferred to the Nerul Unit. In view of this statement, in the affidavit of the First Respondent, permission was given to the Petitioner to explain the correct factual position. Accordingly, an affidavit dated 3rd August 2006 was filed by the Petitioner clarifying that eight of the nine employees whose names have been adverted to by the First Respondent were Computer operators while one was a Xerox machine Operator. These employees have been engaged in the office establishment at Ruby Mills Compound. In so far as the five other employees are concerned, it has been stated that these employees have been transferred from Prabhadevi as far back as between 1989 and 1993 and not after the discontinuation of the activities of the Prabhadevi factory. These facts do establish that the entire Prabhadevi establishment has been closed down and all the workmen therein on

the date of closure had accepted voluntary retirement, save and except for nine workmen who were Computer Operators or, as the case may be, a Xerox Operator, who were absorbed in the administrative office at Ruby Mills Compound. In these circumstances, a case for reinstatement was not made out.

26. In the exercise of the jurisdiction under Article 226 of the Constitution and though this Court has come to the conclusion that an order of reinstatement is not warranted, this Court can mould the relief appropriately. During the pendency of these proceedings the Petitioner and the First Respondent had made an attempt to resolve the dispute amicably. The Court has been informed that this was not possible. An offer has been placed by the Petitioner on the record under which the Petitioner has offered to allow to the First Respondent, the benefit of the formula under the Voluntary Retirement Scheme together with one month's notice pay and retrenchment compensation at the rate of fifteen days' basic wages and dearness allowance. This calculation has been computed notionally on the footing that severance of services would take place

in July 2006. So computed, the First Respondent has been offered a total compensation in the amount of Rs.3,29,637/-. In addition, the First Respondent would be entitled to his gratuity and Provident Fund benefits amounting to Rs.3,09,264/-. The last drawn salary of the First Respondent was in the vicinity of Rs.4,000/- per month. Having regard to the facts and circumstances of the case, I am of the view that the compensation which has been offered to the First Respondent by the Petitioner is a just and fair index of compensation that should be granted to him in lieu of reinstatement by this Court. Upon his being taken back in pursuance of the interim order passed by the Court in November 2003, the First Respondent has received salary though according to the Petitioner, no work has been available. During the pendency of these proceedings, the order of the Labour Court directing payment of 50% back wages was stayed conditional on the Petitioner depositing the back wages before the Court. The amount which has been deposited is directed to be paid to the First Respondent to the extent of the compensation allowed in the aforesaid terms. The balance, if any, together with the accrued interest shall be returned to the Petitioner. The award of the Labour

Court dated 21st April 2003 is set aside. The petition is accordingly disposed of. No order as to costs.

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